[Cite as *State v. Smith*, 2016-Ohio-7390.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 16-CA-15
STEVEN L. SMITH	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Licking County Court of Common Pleas, Case No. 15CR00463
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 17, 2016

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
PAULA SAWYERS Assistant Prosecuting Attorney 20 South Second Street Newark, OH 43055	DENNIS MCNAMARA 88 East Broad Street, Ste. 1350 Columbus, OH 43215

Gwin, P.J.

{¶1} Appellant Steven L. Smith appeals his conviction and sentence after a jury trial in the Licking County Court of Common Pleas for tracking in cocaine and possession of cocaine.

Facts and Procedural History

{¶2} On July 23, 2015, the Licking County Grand Jury indicted Smith for the offenses of Possession of Cocaine in violation of R.C. 2925.11(A)(C)(4)(f), a first degree felony (Count I) and Trafficking in Cocaine in violation of R.C. 2925.03(A)(2) & (C)(4)(g), a first degree felony (Count II). Attached to the second count was a forfeiture specification pursuant to R.C. 2941.1417. The specification requested forfeiture of the vehicle that Smith was driving when arrested and the fifty-eight thousand dollars that the officers seized from Smith's residence.

{¶3} On September 3, 2015, Smith filed a motion to suppress the items seized during the search of his residence. On September 17, 2015, the prosecution filed its response opposing the motion. On October 2, 2015, the trial court conducted oral argument on the motion. The parties agreed that no testimony or evidence would be presented to the trial court on the motion to suppress. On November 5, 2015, the trial court issued its entry overruling the motion.

{¶4} The following evidence was presented during Smith's jury trial.

{¶5} On July 7, 2015, a package was shipped via Federal Express from a Catherine Smith in California to a John Smith located at 50 North 11th Street Newark, Ohio. The package was sent two-day delivery with no signature required.

{¶6} On July 8, 2015 at approximately 11:45 p.m., Smith is observed on the video surveillance system of Big Mommas' House of Chicken and Fish located at 50 North 11th Street, Newark, Ohio. Smith can be seen entering the business and disconnecting the video surveillance system.

{¶7} On July 9, 2015, Detective Jerry Peters was working the package interdiction unit under the narcotics task force with the City of Columbus Police Department. Detective Peters has worked this unit for 17 of his 28 years with the Columbus Police Department. On July 9, 2015, Detective Peters was assigned to Federal Express in Columbus, Ohio.

{¶8} Detective Peters testified that he observed a white cardboard box come down the belt that stood out from the other packages. The box had been heavily taped at all of the seams. The package was coming from California and was addressed from a "Smith" to a "Smith." Further, the telephone number was the same for the sender and the recipient of the package. Detective Peters initiated a LexisNexis Accurint database search and determined that Big Mommas' House of Chicken and Fish was located at the delivery address. Detective Peters called for a canine drug-detecting dog who subsequently alerted upon the package.

{¶9} Detective Peters obtained a search warrant to open the package and discovered over two pounds of cocaine inside the box. A decision was made to place a tracking device inside the package and to attempt a controlled delivery of the parcel. Detective Peters posed as the FedEx delivery person and delivered the package on July 9, 2015 to Big Mommas' House of Chicken and Fish. Detective Peters testified that 50 North 11th Street, Newark, Ohio is a commercial building divided into two sections. One side of the building was vacant; however, the other side of the building housed Big Mommas' House

of Chicken and Fish. Detective Peters did not observe any "50 A" or "50 B" anywhere on the outside of the building.

{¶10} An employee accepted delivery of the package and placed it on a shelf.

{¶11} Special agent Jonathan Dozer of the Ohio Bureau of Criminal Investigation testified that he placed a "package alarm" inside the box. This device would enable the officers to detect if the package is opened and to track the package from a short distance away.

{¶12} Officers maintained a visual surveillance of Big Mommas' House of Chicken and Fish. At approximately 5:50 p.m. on July 9, 2015, Smith is seen restarting the video surveillance system. At approximately 5:55 p.m., the officers detected that the package is being moved. Smith is observed on the video surveillance systems removing the package now located on the bottom rack of a cabinet or stand and leaving the building.

{¶13} Smith is driving a red Subaru. A second vehicle, a black Dodge Durango leaves the parking lot the same time as Smith. When the signal from the package is lost, a marked police cruiser attempted to stop the vehicles.

{¶14} After the officers initiated the emergency lights of their cruiser, they attempted to get around the "Durango which had slowed to almost a stop on 10th Street." Smith's home was "merely several feet away from the traffic stop." The box was recovered in plain view from Smith's vehicle.

{¶15} The Durango continued "and officers attempted to pull it over, but it fled making several turns." The Durango was eventually stopped. Two cell phones that were destroyed were found inside that vehicle.

{¶16} Smith gave Sergeant Alan Thomas of the Licking County Sheriff's Office an address of "252 West Main Street, Newark, Ohio" as his place of residence. (2T. at 365-366). While knocking on the front door of 314 N. 10th Street, a female who identified herself as Smith's mother informed the officers that Smith lived at the premises.

{¶17} Police obtained a warrant to search the premises located at 314 N. 10th Street.

{¶18} Lieutenant Paul Cortright is a law enforcement officer with over twenty-nine years of experience. Twenty-five of his twenty-nine years have been with the Central Ohio Drug Enforcement Task Force. Lieutenant Cortright testified he had received specialized training in dealing with items related to drug trafficking. Lieutenant Cortright testified that he had been involved in the search of the Smith's residence, specifically in the master bedroom. Lieutenant Cortright located a safe. Inside the bedroom closet, Lieutenant Cortright found a cardboard box containing a black vinyl bag. Inside of the bag, Lieutenant Cortright found a $50,000.00 in U.S. currency inside a vacuum-sealed bag. An additional $8,000.00 was found inside the safe. The vacuum sealing machine was also located in the master bedroom. Lieutenant Cortright testified that it is very common to seal up packets of narcotics for redistribution using this type of machine.

{¶19} Lieutenant Cortright further testified that several bags of white powder were located in the kitchen of Smith's home, and his belief was that it was used for cutting cocaine. In addition, a large amount of Inositol a dietary supplement was located underneath the kitchen sink. Lieutenant Cortright testified that a bottle of Inositol costs $149 and is used as a cutting agent for cocaine. Lieutenant Cortright explained that the block of cocaine in the package would be made into a powdered form using something

like a mortar and pestle. A mortar and a pestle were recovered from underneath the sink area in Smith's kitchen. The cocaine would then be mixed with a cutting agent, such as Inositol, and then pressed back into a solid form. A chrome press and a digital scale were also recovered from Smith's home. Additionally, the press found in Smith's home was found to have cocaine residue on it. The mortar and pestle found in Smith's home also had residue on it, but not a sufficient amount to test.

{¶20} No adult female clothing was observed in the home. (2T. at 294; 306; 310).The police also recovered a list with names with amounts of money next to each name.

{¶21} Francione Dumas testified on Smith's behalf. Dumas installed the video surveillance system at Big Mommas' House of Chicken and Fish. Dumas testified that Smith could activate or deactivate the system from his home using a tablet or computer. Dumas testified that on July 8, 2015, Smith brought the DVR recording system to him sometime around 11:30 p.m. to 12:00 a.m. Dumas was to see if the system could handle an additional video camera that Smith wanted to install. Dumas identified State's Exhibit 29 the DVR recording system confiscated by the police on July 9, 2015 from Big Mommas' House of Chicken and Fish as the same system he had received on July 8, 2015. (2T. at 459-460).

{¶22} Ana Jefferies, Smith's fiancé testified that she has lived with Smith at 314 North 10th Street since July 2015. Jefferies testified that the vitamins and supplements belonged to her, including the Inositol. Jefferies testified that she began taking Inositol at the request of her doctor. She further testified that she stored the items underneath the kitchen sink because the bottles were big and would fall off the shelves.

{¶23} Jeffries testifies that she has kept most of her belongings, including most of her clothing, in bags and totes. Further, Jefferies testified that the mortar and pestle, digital scale, and chrome press were used for food preparation.

{¶24} Smith testified on his own behalf. Smith testified that he was not expecting a package to be delivered on July 9, 2015; however, it was not unusual for packages to arrive at Big Mommas' House of Chicken and Fish.

{¶25} On July 9, 2015, Smith was preparing for a barbecue, blues and jazz festival at the business. Smith testified that he took the package when he left work to make room for the party preparations.

{¶26} Smith testified that he was on his way to Walmart to buy produce for the business and then his mother's home at the time he was stopped. Smith testified that he kept the cash found in his home because he had bad experiences with banks in the past and he was attempting to save to buy the building that housed Big Mommas' House of Chicken and Fish. Smith testified that the money came from the business and from his previous business ventures.

{¶27} Smith testified that he has been a model citizen for the past 25 years and has been involved and active in the community. Smith testified his children are successful as well with two children in college and a third a manager.

{¶28} On February 11, 2016, the jury returned verdicts finding Smith guilty on both counts. Smith then elected to have the forfeiture specification tried to the court. The court found Smith guilty of the specification and ordered that the vehicle that he was driving and fifty of the fifty-eight thousand dollars seized from his residence be forfeited.

{¶29} On February 18, 2016, the trial court entered a nunc pro tunc final judgment entry. The court ordered that counts one and two be merged and imposed a mandatory sentence of eleven years on the second count. The court imposed a mandatory fine of ten thousand dollars, which it waived due to Smith's indigence. The court ordered Smith to pay the costs of prosecution, which the court did not waive. The court also ordered that Smith's driver's license be suspended for five years beginning February 11, 2016. Finally, the court notified Smith that he would be subject to a mandatory period of five year of post-release control on his release from prison.

Assignments of Error

{¶30} Smith raises three assignments of error,

{¶31} "I. COUNSEL'S ACTS AND OMISSIONS DEPRIVED APPELLANT OF EFFECTIVE ASSISTANCE OF COUNSEL.

{¶32} "II. THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANT'S MOTION TO SUPPRESS.

{¶33} "III. THE JURY'S VERDICT WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

I.

{¶34} In his first assignment of error, Smith argues that his trial attorney rendered ineffective assistance.

{¶35} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced

by counsel's ineffectiveness. *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180(1993); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373(1989).

{¶36} In order to warrant a finding that trial counsel was ineffective, the petitioner must meet both the deficient performance and prejudice prongs of *Strickland* and *Bradley. Knowles v. Mirzayance*, 556 U.S. 111, 129 S.Ct. 1411, 1419, 173 L.Ed.2d 251(2009).

{¶37} Recently, the United States Supreme Court discussed the prejudice prong of the *Strickland* test,

> With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., at 694, 104 S.Ct. 2052. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id., at 693, 104 S.Ct. 2052. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id., at 687, 104 S.Ct. 2052.
>
> "Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. ——, ——, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689–690, 104

> S.Ct. 2052. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id., at 689, 104 S.Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

Harrington v. Richter, __U.S.__, 131 S.Ct. 770, 777-778, 178 L.Ed.2d 624(2011).

{¶38} The United States Supreme Court and the Ohio Supreme Court have held a reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Bradley,* 42 Ohio St.3d at 143, 538 N.E.2d 373, *quoting Strickland,* 466 U.S. at 697, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984).

A. Other acts evidence.

{¶39} In the case at bar, Smith contends his trial counsel was ineffective when trial counsel failed to object to inadmissible evidence concerning alleged trafficking in drugs for which Smith was not indicted. [Appellant's Brief at 4].

{¶40} "'The failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel.'" *State v. Fears*, 86 Ohio St.3d 329, 347, 715 N.E.2d 136(1999), *quoting State v. Holloway*, 38 Ohio St.3d 239, 244, 527 N.E.2d 831(1988) *Accord, State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶233. A defendant must also show that he was materially prejudiced by the failure to object. *Halloway*, 38 Ohio St.3d at 244, 527 N.E.2d 831.

{¶41} The "other acts" to which Smith objects are items found inside of his home pursuant to the warrant to search the home. Specifically, Smith notes that the officers found and seized fifty-eight thousand dollars in cash, eleven phones, a mortar and pestle, Inositol, a list of three names with numbers next to each name, a mixing bowl, a garlic press, and jewelry bags. [Appellant's Brief at 3].

{¶42} Smith's characterization of the items found inside the home as evidence of other criminal acts is overbroad. Smith was charged with a violation of R.C. 2925.03, which provides, in relevant part,

> (A) No person shall knowingly do any of the following:
>
> (1) Sell or offer to sell a controlled substance or a controlled substance analog;
>
> (2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled substance or a controlled substance analog is intended for sale or resale by the offender or another person.

{¶43} The evidence seized pursuant to the search warrant of the home was relevant to the element of preparing the cocaine for distribution and/or sale. Accordingly, the evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Evid.R. 401. The evidence was not introduced to prove Smith's character in order to show that his conduct was in conformity with that character. Evidence of the indicia of drug trafficking that was collected from the raid is probative as it is the very evidence that is relevant to prove that drug trafficking was occurring.

{¶44} It is unlikely that the trial court would have sustained counsel's objection and excluded the evidence recovered during the search of the home. Thus, Smith would not likely have prevailed on an objection, and his trial counsel was not ineffective for failing to object.

B. Smith's prior record.

{¶45} Smith took the stand on his own behalf. At the beginning of his testimony Smith's trial counsel asked,

Q. Mr. Smith, have you ever engaged in drug trafficking?

A. No, sir.

Q. Well, in the 21st century, correct?

A. No, Sir.

(3T. at 500).

{¶46} Prior to cross examination, the court at the request of the prosecutor, conducted a side bar conference. (3T. at 523-24). The prosecutor argued that trial counsel in the above questioning had opened the door for the cross examination of a

1992 conviction for drug trafficking. (Id.). Trial counsel argued he had not opened the door. (Id.). His argument focused exclusively on the second question to Smith concerning drug trafficking and contained no reference to the first question. (Id.). The court at the end of the side bar ruled "All right. Yeah. The door's been opened." (3T. at 524).

{¶47} Even assuming that Smith could demonstrate that defense counsel performed deficiently, he must also prove that he was prejudiced by counsel's deficient performance. *Strickland*, 466 U.S. at 691–692, 104 S.Ct. 2052, 80 L.Ed.2d 674. *See, State v. Obermiller,* Oh. Sup. Ct. No. 2011-0857, 2016-Ohio-1594, ¶ 93 (Apr. 20, 2016).

{¶48} To show prejudice, he must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S.Ct. 2052. The prejudice inquiry, thus, focuses not only on outcome determination, but also on "whether the result of the proceeding was fundamentally unfair or unreliable." *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

{¶49} In determining whether Smith has indicated a reasonable probability sufficient to undermine confidence in the outcome of the trial we find it helpful to look to the standard to be applied in determining harmless error where a criminal defendant seeks a new trial because of the erroneous admission of evidence.

{¶50} In *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, the Ohio Supreme Court considered the standard to be applied in determining harmless error where a criminal defendant seeks a new trial because of the erroneous admission

of evidence under Evid.R. 404(B). The court summarized its analysis in the subsequent decision of *State v. Harris*, 2015-Ohio-166, —— N.E.3d ——, ¶ 37:

> Recently, in *Morris*, a four-to-three decision, we examined the harmless-error rule in the context of a defendant's claim that the erroneous admission of certain evidence required a new trial. In that decision, the majority dispensed with the distinction between constitutional and non-constitutional errors under Crim.R. 52(A). Id. at ¶ 22–24. In its place, the following analysis was established to guide appellate courts in determining whether an error has affected the substantial rights of a defendant, thereby requiring a new trial. First, it must be determined whether the defendant was prejudiced by the error, i.e., whether the error had an impact on the verdict. Id. at ¶ 25 and 27. Second, it must be determined whether the error was not harmless beyond a reasonable doubt. Id. at ¶ 28. Lastly, once the prejudicial evidence is excised, the remaining evidence is weighed to determine whether it establishes the defendant's guilt beyond a reasonable doubt.

Id. at ¶ 29, 33.

{¶51} There is no indication in light of the overwhelming evidence of Smith's guilt that the jury abandoned their oaths and their integrity and found Smith guilty of the crimes because of his prior conviction.

{¶52} In any case, the evidence overwhelmingly supports a finding of Smith's guilt. Smith cannot claim that but for these statements, he would be acquitted. After a thorough review of the record, we have no doubt that the remaining properly introduced evidence

overwhelmingly establishes defendant's guilt. *See Delaware v. Van Arsdall* (1986), 475 U.S. 673, 681, 106 S.Ct. 1431, 89 L.Ed.2d 674; *State v. Williams* (1983), 6 Ohio St.3d 281, 452 N.E.2d 1323.

{¶53} In *Wilson v. Mazzuca,* cited by Smith trial counsel committed numerous instances of prejudicial ineffectiveness, including: (1) eliciting testimony from the complainant and eyewitness, that he feared Wilson would retaliate against him for testifying; (2) opening the door-by attacking the police investigation of the robbery-to the admission of the complainant's identification of Wilson's "mug shot" from a "mug book" on the day of the robbery; (3) not objecting to the prosecutor's characterization of Wilson's photograph as a "mug shot" and not requesting the redaction of Wilson's "mug shot," which showed him with a booking plate hung around his neck; (4) moving into evidence an unredacted police report describing Wilson's October 1994 arrest for an armed "shake-down" at a construction site; and (5) opening the door to the admission of Wilson's prior convictions for drug possession and physical harassment by eliciting testimony from Younger regarding Wilson's good character. 570 F.3d 490, 502 (2nd Cir. 2009).

{¶54} The trial judge in *Wilson* had repeatedly warned trial counsel concerning his tactics and approach to the case. The court on Wilson's petition for habeas corpus noted, "The record indicates that defense counsel misinterpreted and misunderstood the law, failed to pay attention, acted recklessly, and did not appreciate the consequences of his decisions, even though in many cases he was explicitly warned of the risks by the trial court." Id. at 506.

{¶55} Likewise in *Goodman v. Bertrand*, 467 F.3d 1022, 1029-30 (7th Cir. 2006), cited by Smith, the appellant argued that his trial counsel's performance fell below an

objective standard of reasonableness because his lawyer: (1) opened the door for admission of Goodman's two prior convictions for armed robbery, (2) failed to subpoena the store's cashier to testify, (3) failed to request a limiting instruction regarding the threats evidence, (4) failed to properly object and preserve the record regarding the denial of Goodman's right to confront the witnesses against him, and (5) failed to object and request a mistrial based upon prosecutorial misconduct in closing argument. 467 F.2d at 1030. On appeal from the denial of his petition for habeas corpus, the court noted,

> Counsel's failure to subpoena store cashier Retzlaff was only the first in a catalog of errors. Several other factors contributed to the overall ineffectiveness of Goodman's counsel. Direct examination of Goodman led to the revelation of two prior convictions for armed robbery on cross-examination. Counsel also failed to request an instruction limiting the use of testimony regarding threats made to witnesses, where jurors may have been left with the impression that the threats were orchestrated by Goodman, despite the lack of any evidence to that effect. Nor did counsel make any record of the fact that Ross hoped to receive a time reduction for his testimony, and counsel did not object when the prosecutor insinuated in closing argument that Ross had no motivation to testify. Finally, Goodman's counsel did not object or request a mistrial when the prosecutor augmented Sallis's credibility by falsely arguing in closing that Sallis could not have been convicted or charged for his role in the crime absent his own confession. *While each of these errors considered in isolation may not have been prejudicial to Goodman, viewed in their totality, they create a clear*

> *pattern of ineffective assistance,* the existence of which "l[ies] well outside the boundaries of permissible differences of opinion." Hardaway, 302 F.3d at 762.

Goodman v. Bertrand, 467 F.3d 1022, 1030 (7th Cir. 2006) (emphasis added).

{¶56} In the case at bar, it appears that trial counsel unintentionally asked his question in an overbroad manner. Counsel realizing his mistake quickly attempted to correct the error. There is no pattern in the record before this court that counsel committed multiple transgressions that affected Smith's substantive right to a fair trial.

{¶57} The decision not to request a limiting instruction can be seen as a tactical decision to not draw any more attention to the prior conviction. Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel. *State v. Phillips*, 74 Ohio St.3d 72, 85, 1995–Ohio–171. Even if the wisdom of an approach is questionable, "debatable trial tactics" do not constitute ineffective assistance of counsel. Id. "Poor tactics of experienced counsel, however, even with disastrous result, may hardly be considered lack of due process * * *." *State v. Clayton*, 62 Ohio St.2d 45, 48, 402 N.E.2d 1189 (1980)(*quoting United States v. Denno,* 313 F.2d 364 (2nd Cir.1963), *certiorari denied* 372 U.S. 978, 83 S.Ct. 1112, 10 L.Ed.2d 143.

{¶58} Having reviewed the record that Smith cites in support of his claim that he was denied effective assistance of counsel, we find Smith was not prejudiced by defense counsel's representation of him. The result of the trial was not unreliable nor were the proceedings fundamentally unfair because of the performance of defense counsel. Smith has failed to demonstrate that there exists a reasonable probability that the result of his case would have been different.

{¶59} Smith's first assignment of error is overruled.

II.

{¶60} In his second assignment of error, Smith contends that the trial court erred in overruling his motion to suppress.

{¶61} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 154-155, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. When ruling on a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and to evaluate witness credibility. See *State v. Dunlap*, 73 Ohio St.3d 308,314, 1995-Ohio-243, 652 N.E.2d 988; *State v. Fanning*, 1 Ohio St.3d 19, 20, 437 N.E.2d 583 (1982). Accordingly, a reviewing court must defer to the trial court's factual findings if competent, credible evidence exists to support those findings. See *Burnside,* supra; *Dunlap,* supra; *State v. Long*, 127 Ohio App.3d 328, 332, 713 N.E.2d 1(4th Dist. 1998); *State v. Medcalf*, 111 Ohio App.3d 142, 675 N.E.2d 1268 (4th Dist. 1996). However, once this Court has accepted those facts as true, it must independently determine as a matter of law whether the trial court met the applicable legal standard. See *Burnside,* supra, citing *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539(4th Dist. 1997); See, generally, *United States v. Arvizu*, 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740(2002); *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911(1996). That is, the application of the law to the trial court's findings of fact is subject to a *de novo* standard of review *Ornelas*, *supra*. Moreover, due weight should be given "to inferences drawn from those facts by resident judges and local law enforcement officers." *Ornelas*, supra at 698, 116 S.Ct. at 1663.

{¶62} In the case at bar, Smith filed a motion to suppress alleging that the warrant for the search of his residence was not supported by probable cause.

1. Search Warrant.

{¶63} In addressing the substance of Smith's assignment of error, we begin with Crim.R. 41, which governs the issuance and execution of search warrants in Ohio. Subsection (C) of the rule reads, in pertinent part:

> A warrant shall issue under this rule only on an affidavit or affidavits sworn to before a judge of a court of record and establishing the grounds for issuing the warrant. The affidavit shall name or describe the person to be searched or particularly describe the place to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located. If the judge is satisfied that probable cause for the search exists, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished.

{¶64} In reviewing the affidavit in this case, we are guided by the following instruction by the Ohio Supreme Court: ""[R]eviewing courts may not substitute their own judgment for that of the issuing magistrate by conducting a de novo determination as to whether the affidavit contains sufficient probable cause upon which the reviewing court

would issue the search warrant. On the contrary, reviewing courts should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant." *State v. George*, 45 Ohio St.3d 325, 330 544 N.E.2d 640(1989), paragraph two of the syllabus; *Illinois v. Gates*, 462 U.S. 213, 238-239, 102 S.Ct. 2317(1983), internal citations omitted. "'[T]he duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for * * * conclud[ing]' that probable cause existed." *State v. George*, 45 Ohio St.3d at 329, 544 N.E.2d 640, *citing Illinois v. Gates*, 462 U.S. at 238-239. *See also*, *State v. Norman*, 5th Dist. Guernsey No. 2010-CA-21, 2011-Ohio-568, ¶ 33.

{¶65} In assessing whether a party has met its burden of proof, the Ohio Supreme Court has stated, "[t]he degree of proof required is determined by the impression which the testimony of the witnesses makes upon the trier of facts, and the character of the testimony itself. Credibility, intelligence, freedom from bias or prejudice, opportunity to be informed, the disposition to tell the truth or otherwise, and the probability or improbability of the statements made, are all tests of testimonial value. *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118, 123(1954). See also, *Rice v. City of Cleveland*, 144 Ohio St. 299, 58 N.E. 768(1944). "In determining the sufficiency of probable cause in an affidavit submitted in support of a search warrant, '[t]he task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *State v. George*,

45 Ohio St.3d 325, 330, 544 N.E.2d 640(1989), paragraph two of the syllabus; *Illinois v. Gates*, 462 U.S. 213, 238-238-239, 102 S.Ct. 2317(1983).

{¶66} Moreover, evidence obtained by a law enforcement officer acting in objectively reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause will not be barred by the application of the exclusionary rule. *See State v. George*, 45 Ohio St.3d 325 at paragraph three of the syllabus, *citing United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677(1984).

{¶67} Keeping in mind the foregoing principles, we will begin by discussing the search conducted on July 9, 2015.

a. Smith's prior conviction.

{¶68} Smith first argues that the search warrant was based in part upon his 1992 drug trafficking conviction. Smith argues that because the conviction occurred 23 years ago the information upon its face is stale and could not constitute sufficient probable cause upon which the reviewing court should issue the search warrant.

{¶69} While this information on its own may be insufficient for purposes of establishing probable cause, the information can be utilized to add flavor and force to the non-stale information. *State v. Cook,* 5th Dist. Muskingum Nos. 2010-CA-40, 2010-CA-41, 2011-Ohio-1776, ¶26; *State v. Neil,* 10th Dist. Franklin Nos. 14AP-981, 15AP-594, 2016-Ohio-4762, ¶56; *State v. Clayton,* 8th Dist. Cuyahoga No. 102277, 2015-Ohio-4370, ¶25; *State v. Swift*, 12th Dist. Butler No.CA2013-08-161, 2014-Ohio-2004, ¶24.

{¶70} Various federal circuit courts, as reviewed in *State v. Marko*, 36 Ohio App.2d 114, 118–119, 303 N.E.2d 94(1973), have held that there is no arbitrary time limit

on how old information contained in an affidavit may be, so long as there are sufficient facts to justify a conclusion that the subject contraband is probably on the person or premises to be searched at the time the warrant is issued. *See United States v. Johnson*, 461 F.2d 285 10th Dist. 1972); *Durham v. United States*, 403 F.2d 190(9th Dist. 1968); *United States v. Guinn*, 454 F.2d 29 (5th Dist. 1972), *certiorari denied* (1972), 407 U.S. 911, 92 S.Ct. 2437, 32 L.Ed.2d 685; *Schoeneman v. United States*, 317 F.2d 173 (D.C. Dist. 1963). *See also, State v. Yanowitz*, 67 Ohio App.2d 141, 147, 426 N.E.2d 190, 193 (8th Dist. 1980).

{¶71} Regarding the issue of whether past reports of criminal activity can be used to support a search warrant, the Federal Court of Appeals for the Eighth District has stated "[i]t is well-settled that information about criminal activity at an earlier unspecified time may combine with factually connected, recent, time-specific information to provide substantial basis for the conclusion that criminal activity described in an affidavit is sufficiently close in time to the search warrant application." (Citations omitted). *U.S. v. Day*, 949 F.2d 973, 978(8th Cir. 1991).

{¶72} In the case at bar, Smith's prior conviction was simply one factor. Recent information corroborated the otherwise stale information. The affidavit in this case included pertinent information such as Smith taking a package containing approximately two pounds of cocaine from his place of business to his home.

b. Odor of marihuana.

{¶73} Smith next contends that the odor of marihuana emanating from the air conditioning unit of the home was insufficient to establish probable cause because the affidavit did not set forth the officer's training in the ability to detect the odor of marihuana.

{¶74} The essential test for determining whether the detection of an odor establishes sufficient probable cause for a search warrant was set forth by the Supreme Court in *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948). In *Johnson,* the Supreme Court found that a magistrate may rely on the detection of an odor to establish probable cause for a search "[if] the presence of the odor is testified to before [the] magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinct to identify a forbidden substance." Id. at 14. *See, also State v. Moore*, 90 Ohio St.3d 47, 734 N.E.2d 804(2000).

{¶75} In *Moore, supra* the Ohio Supreme Court noted that "[t]he United States Supreme Court has long acknowledged that odors may be persuasive evidence to justify the issuance of a search warrant." Id., *citing Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436(1948). The *Moore* court emphasized that its holding was based on the totality of the circumstances, which in that instance, justified the warrantless search of the defendant's person "[b]ecause marijuana and other narcotics are easily and quickly hidden or destroyed, [and] a warrantless search may be justified to preserve evidence." Id. at 52, 734 N.E.2d 804. The court reasoned that those are "compelling reasons" or "exceptional circumstances" that would "justify an intrusion without a warrant." Id. We reached the same conclusion that a warrantless search of a suspect's motor vehicle was unreasonable based solely upon the smell of marihuana without evidence that the officer was qualified to recognize the odor. *State v. Birdsong*, 5th Dist. Stark No. 2008 CA 00221, 2009–Ohio–1859.

{¶76} We find that we need not reach the issue of whether or not the judge could rely upon the odor of marijuana as a factor in issuing the warrant in the case at bar. The

judge did not rely exclusively upon this information to issue the warrant. As will be discussed *infra* we find that based upon Detective Thomas' affidavit, even without the detection of the odor of marijuana by Detective Kimble there would have been a substantial basis for concluding that probable cause existed to support the warrant's issuance.

{¶77} In *State v. Gross*, the Ohio Supreme Court observed,

> The United States Supreme Court has held that, after excising tainted information from a supporting affidavit, "if sufficient untainted evidence was presented in the warrant affidavit to establish probable cause, the warrant was nevertheless valid." *United States v. Karo* (1984), 468 U.S. 705, 719, 104 S.Ct. 3296, 82 L.Ed.2d 530. *See, also, United States v. Macias* (C.A.10, 1999), 202 F.3d 283, 1999 WL 1244469 (unpublished opinion), *quoting United States v. Snow* (C.A.10, 1990), 919 F.2d 1458, 1460 ("'An affidavit containing erroneous or unconstitutionally obtained information invalidates a warrant if that information was critical to establishing probable cause. If, however, the affidavit contained sufficient accurate or untainted evidence, the warrant is nevertheless valid' "); *United States v. Whitehorn* (C.A.2, 1987), 829 F.2d 1225, 1231, *quoting United States v. Levasseur* (E.D.N.Y.1985), 620 F.Supp. 624, 631, fn. 2 (" '[i]t is well settled that "[t]he ultimate inquiry * * * is not whether the underlying affidavit contained allegations based on illegally obtained evidence, but whether, putting aside all tainted allegations, the independent and lawful

information stated in the affidavit suffices to show probable cause" ' "); State *v. Booker* (Nov. 20, 1989), Montgomery App. No. 11255, 1989 WL 140201.

97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, ¶17.

c. Nexus between the package and Smith's residence.

{¶78} Smith next argues that the search warrant was invalid because it fails to establish a nexus between his home and any alleged criminal activity.

{¶79} With regard to the "nexus" element, the task of a magistrate in determining whether probable cause exists is "to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him ... there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates,* 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). In order to establish probable cause, the facts presented to the magistrate need only "warrant a man of reasonable caution" to believe that evidence of a crime will be found. *Texas v. Brown*, 460 U.S. 730, 742, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) (plurality opinion). The probable cause standard "does not demand showing that such a belief be correct or more likely true than false." Id. The criterion is whether the facts presented in the affidavit would "warrant a man of reasonable caution" to believe that evidence of crime will be found. *Brown*, 460 U.S. at 742, 103 S.Ct. 1535. There is no requirement that the belief be shown to be necessarily correct or more likely true than false. *See Spinelli v. United States*, 393 U.S. 410, 419, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969) ("only the probability, and not a prima facie showing" is required). A "practical, commonsense" assessment, providing a substantial basis for the magistrate's finding of probable cause, is what is called for. *Gates*, 462 U.S. at 238, 103 S.Ct. 2317.

{¶80} In the case at bar Detective Thomas' affidavit detailed the discovery and the delivery of the Fed Ex box containing over two pounds of cocaine to Smith's place of business. The box contained a tracking device. The affidavit noted, "The box was addressed to a John Smith at that 50 North 11th Street, Newark, Ohio 43055, and was shipped from Catherine Smith of Santa Ana California." The label contained the same phone number for the sender and the receiver of the package. A search of the local newspaper indicated that Smith was the registered tenant of a business bearing the name of "Big Mamma's House of Chicken and Fish"

{¶81} At the close of business on July 9, 2015, Smith left the business driving "a dark colored Subaru with a black Dodge Durango following close behind." A marked unit attempted to stop the vehicles after the tracking signal had been lost. After the officers initiated the emergency lights of their cruiser, they attempted to get around the "Durango which had slowed to almost a stop on 10th Street." Smith's home was "merely several feet away from the traffic stop." The box was recovered in plain view from Smith's vehicle.

{¶82} The Durango continued "and officers attempted to pull it over, but it fled making several turns." The Durango was eventually stopped. Two cell phones that were destroyed were found inside that vehicle.

{¶83} While knocking on the front door of 314 N. 10th Street, a female who identified herself as Smith's mother informed the officers that Smith lived at the premises.

{¶84} No facts or testimony was introduced during the hearing on the motion to suppress. [See, Appellant's Brief at 18].

{¶85} Smith argues that the mere fact he was stopped several feet away from his residence with over two pounds of cocaine in his car is not sufficient to permit an inference that evidence of drug activity would be found inside his home.

{¶86} The nexus between the objects to be seized and the premises searched need not, and often will not, rest on direct observation, but rather "can be inferred from the type of crime, the nature of the items sought, the extent of an opportunity for concealment and normal inferences as to where a criminal would hide [evidence of a crime]...." *United States v. Charest*, 602 F.2d 1015, 1017 (1st Cir.1979). In *United States v. Williams*, the Court explained,

> In a recent line of cases, we have held that an issuing judge may infer that drug traffickers use their homes to store drugs and otherwise further their drug trafficking. *See, e.g., United States v. Miggins*, 302 F.3d 384, 393-94 (6th Cir.2002); *see also United States v. Gunter*, 266 Fed.Appx. 415, 419 (6th Cir.2008) (unpublished decision) (noting that our precedents establish that there is a nexus between a drug dealer's criminal activity and the dealer's residence when there is reliable evidence connecting the criminal activity to the residence); *United States v. Newton*, 389 F.3d 631, 636 (6th Cir.2004), *vacated in part on other grounds*, 546 U.S. 803, 126 S.Ct. 280, 163 L.Ed.2d 35 (2005) (holding that in cases involving drug traffickers engaged in "continuing operations," the "lack of a direct known link between the criminal activity and the residence[ ] becomes minimal"); *Caicedo*, 85 F.3d at 1192-93(holding that there was probable cause based on an affidavit that stated, in the affiant's experience, many drug traffickers

> use their residences to conduct their drug trafficking activities). *But cf. Schultz,* 14 F.3d at 1097-98(holding that a search warrant should not have issued where the officer seeking the warrant had nothing more than a guess that contraband or evidence of a crime would be found in a drug trafficker's safe deposit box).

544 F.3d 683, 687(6th Cir. 2008). *Accord, State v. Clayton,* 8th Dist. Cuyahoga No. 102277, 2015-Ohio-4370, ¶ 18; *United States v. Feliz,* 182 F.3d 82, 88 (1st Cir. 1999).

{¶87} In the case at bar Smith took control and possession of the package when he removed it from his place of employment and placed it inside his vehicle. Smith did not leave the package at the business; nor did he open the package at that location. Smith and another vehicle leave the business at the same time. The traffic stop occurred within several feet of Smith's residence. The second vehicle flees the scene. The nature of the crime of preparing cocaine for distribution or shipment indicates that the drugs must undergo processing and packaging operations. It is not unreasonable to believe that there are few places more convenient or private than one's residence to accomplish those purposes. The fact the package was addressed to "John" as opposed to "Steven" Smith standing alone is insufficient to negate the otherwise proper inferences to be draw from the facts described in the affidavit.

{¶88} In the case at bar we find the facts as detailed in the affidavit would warrant a reasonable man of reasonable caution to believe that evidence of a crime would be found at Smith's residence. We find the judge had a substantial basis for his finding of probable cause.

{¶89} Smith's second assignment of error is overruled.

III.

{¶90} In his third assignment of error, Smith contends that his conviction is against the sufficiency of the evidence. Specifically, Smith argues there is no evidence that he knew the package contained over two pounds of cocaine.

{¶91} Our review of the constitutional sufficiency of evidence to support a criminal conviction is governed by *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), which requires a court of appeals to determine whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id.; see also *McDaniel v. Brown*, 558 U.S. 120, 130 S.Ct. 665, 673, 175 L.Ed.2d 582(2010) (reaffirming this standard); *State v. Fry*, 125 Ohio St.3d 163, 926 N.E.2d 1239, 2010–Ohio–1017, ¶146; *State v. Clay*, 187 Ohio App.3d 633, 933 N.E.2d 296, 2010–Ohio–2720, ¶68.

{¶92} Weight of the evidence addresses the evidence's effect of inducing belief. *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997). Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue, which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief." Id. at 387, 678 N.E.2d 541, *quoting* Black's Law Dictionary (6th Ed. 1990) at 1594.

{¶93} When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a

"'thirteenth juror'" and disagrees with the fact finder's resolution of the conflicting testimony. Id. at 387, 678 N.E.2d 541, *quoting Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). However, an appellate court may not merely substitute its view for that of the jury, but must find that "'the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *State v. Thompkins, supra*, 78 Ohio St.3d at 387, *quoting State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720–721 (1st Dist. 1983). Accordingly, reversal on manifest weight grounds is reserved for "'the exceptional case in which the evidence weighs heavily against the conviction.'" Id.

> "[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts.
>
> * * *
>
> "If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment."

Seasons Coal Co., Inc. v. Cleveland, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, *quoting* 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978).

{¶94} Smith was convicted of possession. R.C. 2925.11 provides in relevant part,

> (A) No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog.

* * *

{¶95} A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact. R.C. 2901.22(B).

{¶96} Whether a person acts knowingly can only be determined, absent a defendant's admission, from all the surrounding facts and circumstances, including the doing of the act itself." (Footnotes omitted). *State v. Huff*, 145 Ohio App.3d 555, 563, 763 N.E.2d 695(1st Dist. 2001). Thus, "[t]he test for whether a defendant acted knowingly is a subjective one, but it is decided on objective criteria." *State v. McDaniel*, 2nd Dist. Montgomery No. 16221, 1998 WL 214606 (May 1, 1998) (citing *State v. Elliott*, 104 Ohio App.3d 812, 663 N.E.2d 412(10th Dist. 1995)).

{¶97} R.C. 2925.01(K) defines possession as follows: " 'Possess' or 'possession' means having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found." R.C. 2901.21 provides the requirements for criminal liability and provides that possession is a "voluntary act if the possessor knowingly procured or received the thing possessed, or was aware of the possessor's control of the thing possessed for sufficient time to have ended possession." R.C. 2901.21(D)(1).

{¶98} Possession may be actual or constructive. *State v. Butler*, 42 Ohio St.3d 174, 176, 538 N.E.2d 98(1989); *State v. Haynes*, 25 Ohio St.2d 264, 267 N.E.2d 787(1971); *State v. Hankerson*, 70 Ohio St.2d 87, 434 N.E.2d 1362(1982), syllabus. To establish constructive possession, the evidence must prove that the defendant was able to exercise dominion and control over the contraband. *State v. Wolery*, 46 Ohio St.2d 316, 332, 348 N.E.2d 351(1976). Dominion and control may be proven by circumstantial evidence alone. *State v. Trembly*, 137 Ohio App.3d 134, 738 N.E.2d 93(8th Dist. 2000). Circumstantial evidence that the defendant was located in very close proximity to the contraband may show constructive possession. *State v. Butler*, supra; *State v. Barr*, 86 Ohio App.3d 227, 235, 620 N.E.2d 242, 247-248(8th Dist. 1993); *State v. Morales*, 5th Dist. Licking No. 2004 CA 68, 2005-Ohio-4714, ¶50; *State v. Moses,* 5th Dist. Stark No. 2003CA00384, 2004-Ohio-4943,¶9. Ownership of the contraband need not be established in order to find constructive possession. *State v. Smith*, 9th Dist. Summit No. 20885, 2002-Ohio-3034, ¶13, *citing State v. Mann*, (1993) 93 Ohio App.3d 301, 308, 638 N.E.2d 585(8th Dist. 1993). Furthermore, possession may be individual or joint. *Wolery*, 46 Ohio St.2d at 332, 348 N.E.2d 351. Multiple individuals may constructively possess a particular item of contraband simultaneously. *State v. Pitts*, 4th Dist. Scioto No. 99 CA 2675, 2000-Ohio-1986. The Supreme Court has held that knowledge of illegal goods on one's property is sufficient to show constructive possession. *State v. Hankerson*, 70 Ohio St.2d 87, 91, 434 N.E.2d 1362, 1365(1982), certiorari denied, 459 U.S. 870, 103 S.Ct. 155, 74 L.Ed.2d 130(1982).

{¶99} In the case at bar the state presented evidence that prior to the delivery of the cocaine to Smith’s place of business, Smith disabled the video surveillance system.

When the system is reactivated, Smith is seen removing the package containing the cocaine. The package had been moved from the place where the employee who had accepted it had placed it. Smith then places the package in his vehicle. Smith does not immediately stop when Officers attempt a traffic stop. Smith gave Sergeant Alan Thomas of the Licking County Sherriff's Office an address of "252 West Main Street, Newark, Ohio" as his place of residence. (2T. at 365-366).

{¶100} Smith was also charged with Trafficking. R.C. 2925.03, provides in relevant part,

> (A) No person shall knowingly do any of the following:
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> * * *
>
> (2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled substance or a controlled substance analog is intended for sale or resale by the offender or another person.

{¶101} Lieutenant Paul Cortright, a law enforcement officer with over twenty-nine years of experience. Twenty-five of his twenty-nine years have been with the Central Ohio Drug Enforcement Task Force. Lieutenant Cortright testified he had received specialized training in dealing with items related to drug trafficking. Lieutenant Cortright testified that he had been involved in the search of the Smith's residence, specifically in the master bedroom. Lieutenant Cortright located a safe and, inside a cardboard box found in a black vinyl bag. Inside of the bag, Lieutenant Cortright found a $50,000.00 in U.S. currency inside a vacuum-sealed bag. The vacuum sealing machine was also located in

the master bedroom. Lieutenant Cortright testified that it is very common to seal up packets of narcotics for redistribution.

{¶102} Lieutenant Cortright further testified that several bags of white powder were located in the kitchen of Smith's home, and his belief was that it was used for cutting cocaine. In addition, a large amount of Inositol a dietary supplement was located underneath the kitchen sink. Lieutenant Cortright testified that a bottle of Inositol costs $149 and is used as a cutting agent for cocaine. Lieutenant Cortright explained that the block of cocaine in the package would be made into a powdered form using something like a mortar and pestle. A mortar and a pestle were recovered from underneath the sink area in Smith's kitchen. The cocaine would then be mixed with a cutting agent, such as Inositol, and then pressed back into a solid form. A chrome press and a digital scale were also recovered from Smith's home. Additionally, the press found in Smith's home was found to have cocaine residue on it. The mortar and pestle found in Smith's home also had residue on it, but not a sufficient amount to test.

{¶103} If the state relies on circumstantial evidence to prove an essential element of an offense, it is not necessary for "such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction." *State v. Jenks*, 61 Ohio St.3d 259, 272, 574 N.E. 2d 492(1991), paragraph one of the syllabus, *superseded by State constitutional amendment on other grounds as stated in State v. Smith*, *80 Ohio St.3d 89, 684 N.E.2d 668(1997).* "Circumstantial evidence and direct evidence inherently possess the same probative value [.]" *Jenks*, 61 Ohio St.3d at paragraph one of the syllabus. Furthermore, "[s]ince circumstantial evidence and direct evidence are indistinguishable so far as the jury's fact-finding function is concerned, all that is required

of the jury is that i[t] weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt." *Jenks*, 61 Ohio St.3d at 272, 574 N.E. 2d 492. While inferences cannot be based on inferences, a number of conclusions can result from the same set of facts. *State v. Lott*, 51 Ohio St.3d 160, 168, 555 N.E.2d 293(1990), citing *Hurt v. Charles J. Rogers Transp. Co*, 164 Ohio St. 329, 331, 130 N.E.2d 820(1955). Moreover, a series of facts and circumstances can be employed by a jury as the basis for its ultimate conclusions in a case. *Lott,* 51 Ohio St.3d at 168, 555 N.E.2d 293, citing *Hurt,* 164 Ohio St. at 331, 130 N.E.2d 820.

{¶104} Viewing the evidence in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that Smith committed the crimes of possession of cocaine and trafficking in cocaine. We hold, therefore, that the state met its burden of production regarding each element of the crime of trafficking in cocaine and, accordingly, there was sufficient evidence to support Smith's conviction for possession of cocaine and trafficking in cocaine.

{¶105} As an appellate court, we are not fact finders; we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent and credible evidence, upon which the fact finder could base his or her judgment. *Cross Truck v. Jeffries*, 5th Dist. Stark No. CA–5758, 1982 WL 2911(Feb. 10, 1982). Accordingly, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction*, 54 Ohio St.2d 279, 376 N.E.2d 578(1978). The Ohio Supreme Court has emphasized: "'[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable

intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts. * * *.'" *Eastley v. Volkman,* 132 Ohio St.3d 328, 334, 972 N.E. 2d 517, 2012-Ohio-2179, *quoting Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, *quoting* 5 Ohio Jurisprudence 3d, Appellate Review, Section 603, at 191–192 (1978). Furthermore, it is well established that the trial court is in the best position to determine the credibility of witnesses. *See, e.g., In re Brown*, 9th Dist. No. 21004, 2002–Ohio–3405, ¶ 9, *citing State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212(1967).

{¶106} Ultimately, "the reviewing court must determine whether the appellant or the appellee provided the more believable evidence, but must not completely substitute its judgment for that of the original trier of fact 'unless it is patently apparent that the fact finder lost its way.'" *State v. Pallai*, 7th Dist. Mahoning No. 07 MA 198, 2008-Ohio-6635, ¶31, *quoting State v. Woullard*, 158 Ohio App.3d 31, 2004-Ohio-3395, 813 N.E.2d 964 (2nd Dist. 2004), ¶ 81. In other words, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. Mahoning No. 99 CA 149, 2002-Ohio-1152, at ¶ 13, *citing State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125(7th Dist. 1999).

{¶107} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212(1967), paragraph one of the syllabus; *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶118. *Accord, Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86

L.Ed. 680 (1942); *Marshall v. Lonberger*, 459 U.S. 422, 434, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

{¶108} The jury as the trier of fact was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Craig*, 10th Dist. Franklin No. 99AP-739, 1999 WL 29752 (Mar 23, 2000) *citing State v. Nivens*, 10th Dist. Franklin No. 95APA09-1236, 1996 WL 284714 (May 28, 1996). Indeed, the jury need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver,* 10th Dist. Franklin No. 02AP-604, 2003-Ohio-958, ¶21, *citing State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964); *State v. Burke,* 10th Dist. Franklin No. 02AP-1238, 2003-Ohio-2889, *citing State v. Caldwell*, 79 Ohio App.3d 667, 607 N.E.2d 1096 (4th Dist. 1992). Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks,* 61 Ohio St.3d 259, 272, 574 N.E.2d 492 (1991), paragraph one of the syllabus, *superseded by State constitutional amendment on other grounds as stated in State v. Smith, 80 Ohio St.3d 89, 102 at n.4, 684 N.E.2d 668 (1997).*

{¶109} In the case at bar, the jury heard the witnesses, viewed the evidence and heard Smith's arguments concerning his lack of knowledge of what was contained inside the package.

{¶110} We find that this is not an "'exceptional case in which the evidence weighs heavily against the conviction.'" *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678

N.E.2d 541 (1997), *quoting Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717. The jury neither lost his way nor created a miscarriage of justice in convicting Wilson of the charges.

{¶111} Based upon the foregoing and the entire record in this matter, we find Smith's convictions are not against the sufficiency or the manifest weight of the evidence. To the contrary, the jury appears to have fairly and impartially decided the matters before them. The jury as a trier of fact can reach different conclusions concerning the credibility of the testimony of the state's witnesses and Smith and his witnesses. This court will not disturb the jury's finding so long as competent evidence was present to support it. *State v. Walker*, 55 Ohio St.2d 208, 378 N.E.2d 1049 (1978). The jury heard the witnesses, evaluated the evidence, and was convinced of Smith's guilt.

{¶112} Finally, upon careful consideration of the record in its entirety, we find that there is substantial evidence presented which if believed, proves all the elements of the crimes of possession of cocaine and trafficking in cocaine beyond a reasonable doubt.

{¶113} Smith's third assignment of error is overruled.

{¶114} The judgment of the Licking County Court of Common Pleas, Licking County, Ohio is affirmed.

By Gwin, P.J.,

Wise, J., and

Delaney, J., concur